

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. Y-05/10-248
)
 Appeal of)

INTRODUCTION

The Department for Disabilities, Aging and Independent Living (DAIL) substantiated petitioner for abuse of a vulnerable adult, C.T., based on petitioner's actions on September 8, 2009.

On September 8, 2009, petitioner and S.T. went to the home of C.T., a vulnerable adult, to whom both petitioner and S.T. had provided personal care attendant services. They arrived at 5:50 p.m. Petitioner sought her paystubs and wanted C.T.'s signature on an employment form from the Department for Children and Families. They arrived at C.T.'s residence during a time C.T. did not have a personal care attendant with her and refused to leave after C.T. told them to leave. C.T. used her lifeline and subsequently received assistance from law enforcement.

On September 29, 2009, DAIL received a report that petitioner emotionally abused C.T. Adult Protective Services investigated the report and issued a report on February 25, 2010 to substantiate petitioner for emotional abuse of a

vulnerable adult. Petitioner's appeal is from the Commissioner's Review of April 26, 2010 in which the Commissioner substantiated petitioner for emotional abuse of C.T. finding that petitioner's decision on September 8, 2009 to remain in C.T.'s home after being asked to leave amounted to intimidation.

The issue is whether DAIL has shown by a preponderance of evidence that petitioner's conduct on September 8, 2009 constitutes abuse as abuse is defined in 33 V.S.A. § 6902(1).

Pre-Hearing History

Petitioner filed for fair hearing on or about May 17, 2010. DAIL also substantiated S.T. for abuse of a vulnerable adult, C.T., and S.T. filed for fair hearing. Both cases were assigned to the same hearing officer and a series of telephone status conferences were held on June 8, July 12, and August 9, 2010. During September 2010 a decision was made to transfer petitioner's case to the other hearing officer.

A telephone status conference was held on October 5, 2010 and the parties were told to exchange witness lists. DAIL provided petitioner with a witness list and copies of materials. A telephone status conference was held on November 1, 2010 in which petitioner identified her potential

witnesses. The matter was set for hearing on December 14, 2010.

By letter dated November 19, 2010, DAIL requested a telephone status conference. On November 22, 2010, DAIL filed a Motion for Telephone Testimony and For Consolidation of Hearings for Purpose of Alleged Victim Testimony. DAIL argued that testifying twice was a hardship given C.T.'s muscular dystrophy, mobility issues, and difficulty speaking for an extended time and due to the cost of transportation for C.T.

A telephone status conference was held on November 30, 2010 in which the parties were told that the hearings would not be consolidated. Petitioner indicated that she opposed the proposal for telephone testimony. DAIL filed additional argument supporting their request for C.T. to testify by telephone.

A subsequent telephone status conference was set for December 7, 2010 to discuss C.T.'s testimony and see if the hearing would go forward on December 14, 2010. Petitioner did not participate on December 7, 2010. The telephone status conference was rescheduled for December 14, 2010 with notice that the hearing would be rescheduled.

On December 10, 2010, the Board was faxed a letter from the hospice coordinator of the local Home Health and Hospice agency regarding C.T. The hospice coordinator wrote the C.T. was bedbound, in the end stage of Freidrich's ataxia (progressive degenerative neurological disease), and was physically unable to leave her home to attend a hearing. She described C.T. as having a compromised respiratory system and finding it difficult to speak. The hospice coordinator indicated that C.T. could give testimony over the telephone to one person but that C.T. may not have the stamina to do so in full in one conversation.

A telephone status conference was held on December 14, 2010. The parties agreed to an accommodation for C.T. allowing the hearing officer to question C.T. by telephone with input from the parties both prior to the questioning and before the questioning concluded. The petitioner and DAIL were directed to propose questions for C.T.'s examination. DAIL provided draft questions on or about December 23, 2010.

A telephone status conference was held on January 11, 2011 and petitioner was given one week to provide her questions to the Board. The Board scheduled January 25, 2011 for C.T.'s testimony. The parties and hearing officer would convene at the local district office and the hearing officer,

in the presence of the parties, would examine C.T. by telephone, and give the parties the opportunity to propose additional questions for the hearing officer to use after listening to C.T.'s answers.

Petitioner did not appear on January 25, 2011. Testimony was taken by telephone of C.T. The hearing officer is not admitting the telephone testimony of C.T. on January 25, 2011 into evidence given the due process concerns that petitioner had no opportunity to question the witness.

Petitioner sent materials to the Board subsequent to the January 25, 2011 arrangement. A telephone status conference was held on March 8, 2011 and the hearing was scheduled for April 19, 2011. The parties were directed to exchange witness lists and for DAIL to provide petitioner with a copy of the transcript of the September 8, 2009 Lifeline call initiated by petitioner. The Board supplied petitioner with a Subpoena for a witness and instructions for service of the Subpoena.

The hearing was held on April 19, 2011. Testimony was taken from Trooper J.S. and L.G., Adult Protective Service Investigator. Petitioner testified on her own behalf.

The exhibits admitted at hearing on behalf of the Department are:

DAIL 1. Law Supplemental Narrative prepared by Trooper J.S. on October 3, 2009 that includes a verbatim record of the statement petitioner gave Trooper J.S. on September 17, 2009.

DAIL 2. Lifeline Case History for C.T. denoting the time the lifeline signal was received on September 8, 2009 and the call(s) initiated.

DAIL 3. Certified transcript of the September 8, 2009 lifeline call(s).

DAIL 4. Adult Protective Services Investigative Report prepared by L.G. on February 25, 2010 for the limited purpose of showing the steps taken in this investigation.

The following is based on the evidence adduced at hearing.

FINDINGS OF FACT

1. The petitioner is a certified medical assistant and was first certified twenty-three years ago. Over the past five years, petitioner provided personal attendant care services to several disabled individuals, mainly through private care.

2. The parties stipulate that C.T. is a vulnerable adult as that term is defined by statute. In particular, C.T. is an elderly individual who, at the time of the incident, was wheelchair bound due to muscular dystrophy and other impairments, and had been receiving personal care services from a home health agency for over one month.

3. Petitioner was a personal care attendant for C.T. for more than a year and a half. During the time petitioner worked for C.T., C.T. was alone from 4:00 p.m. to 6:00 p.m. daily. Petitioner was aware of C.T.'s physical limitations.

4. At the time of the incident, Petitioner knew C.T.'s schedule and knew that L.P., a personal care attendant, would arrive at 6:00 p.m. to begin her shift.

5. C.T. terminated petitioner from her position. It appears that C.T. terminated petitioner at the beginning of September 2009, about one week before the incident. Petitioner testified that she did not see the termination coming and was very surprised. Petitioner testified that she came to work and was told she no longer had a job. Petitioner testified that she was terminated the Tuesday after Labor Day. However, September 8, 2009 was the Tuesday after Labor Day indicating that petitioner's memory of the dates, more than one year after the event, was faulty.

6. C.T. was in possession of petitioner's paystubs.¹ In addition, petitioner testified that she notified the Department for Children and Families of the loss of her job and that she needed C.T. to sign a termination form from the

¹ Petitioner did not know that C.T. shredded the paystubs prior to September 8, 2009.

Department because the Department needed current information to determine petitioner's eligibility for continuing healthcare coverage for her family. There is no testimony that coming to C.T.'s home was the only way to retrieve the paystubs and have the form signed.

7. Petitioner decided to go to C.T.'s home to retrieve her paystubs and have the form signed by C.T. Prior to doing so, petitioner spoke to S.T. and told her that C.T. had one of S.T.'s paychecks and told S.T. of her intention to go to C.T.'s home on September 8, 2009.

8. Petitioner did not contact C.T. in advance to let C.T. know that she needed her paystubs and that she needed C.T.'s signature on a form. Petitioner did not contact C.T. in advance to arrange for petitioner to pick up her paystubs and have the form signed. Petitioner should have been aware that C.T. might not want to see petitioner after terminating petitioner from employment.

9. Petitioner drove to C.T.'s home on September 8, 2009 with her two children. S.T. drove separately and arrived at the same time as petitioner. They arrived about 5:50 p.m. They arrived before the 6:00 p.m. shift of L.P., the evening personal care attendant. They did not wait for L.P. to arrive before going into C.T.'s house.

10. C.T. was alone when petitioner, her children, and S.T. entered C.T.'s home into the kitchen.

11. Petitioner testified that she went to the door and knocked and heard C.T. say something and petitioner thought C.T. was telling them to come in. Petitioner, her children, and S.T. came into kitchen. C.T. was in the living room in her chair. Petitioner explained why they were there. Petitioner testified that C.T. went into hysterics, screaming at them, using curse words and telling them repeatedly to leave her home. Petitioner testified that she told C.T. to press lifeline so police would come and then they could leave.²

12. The Lifeline case history shows that C.T. activated her lifeline at 5:55 p.m. and the Lifeline operator called her at 6:05 p.m. The police were contacted by Lifeline. The Lifeline operator stayed on the telephone with C.T. until the police arrived and then continued calls with L.P. and C.T. and with the police.

The Lifeline calls are recorded contemporaneously. C.T.'s statements to the Lifeline operator were made during the incident in question. Petitioner testified that C.T. was

² It appears that petitioner thought the police could calm the situation so that she could retrieve what she came for.

hysterical. C.T.'s statements to the Lifeline operator are admissible as an excited utterance pursuant to Vermont Rules of Evidence (V.R.E.) 803(2).³

In the transcript, C.T. says that there are intruders in her home who are disgruntled and who "are just from hell". C.T. states that petitioner wants her pay stubs but she previously shredded the pay stubs and that petitioner is a disgruntled employee. C.T. indicates that petitioner and the three others are in the kitchen waiting for the police to come.

13. In petitioner's September 17, 2009 statement to Trooper J.S., petitioner stated "She [C.T.] said screamed at one point "leave" I then said it doesn't have to be like this, I just want what's mine. Because [C.T.] fired me without me even knowing. As [C.T.] continued screaming "Intruders" I said maybe she should call Middlebury Police to calm situation down."

14. Petitioner testified that she was torn about leaving because C.T. could be vengeful but that she was concerned about C.T.'s health because she could see that C.T. was becoming shaky since anger can affect C.T.'s diabetes.

³V.R.E. 803(2) states that an excited utterance is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement cause by the event or condition."

Petitioner was asked why she did not call C.T. before coming to C.T.'s home. Petitioner answered that she thought they were friends so that calling ahead would not be necessary.

15. Throughout the course of this case and in her testimony, petitioner has been contradictory in her description of C.T. For the most part, petitioner has described C.T. as difficult and vengeful. At other times, petitioner said C.T. was like a mother to her and that they got along well.

Petitioner's decision to drop in without advance notice, with another terminated employee, and during a time when petitioner knew C.T. was alone must be considered in light of the fact that C.T. had just terminated petitioner and in light of petitioner's description of C.T. as a difficult and vengeful person.

Petitioner testified that she did not leave upon C.T.'s request because she was concerned about C.T.'s agitation and its impact upon C.T.'s health. There is nothing in the petitioner's police statement to indicate that petitioner remained out of concern for C.T. Petitioner's testimony about her reason for staying after being asked to leave is

not credible. Petitioner remained because she wanted her paystubs and she wanted C.T. to sign a form.

16. The evidence shows that petitioner came to C.T.'s home at a time when petitioner knew C.T. was alone because she wanted paystubs and she wanted C.T. to sign a form, that petitioner did not leave upon C.T.'s request, and that C.T. was agitated and upset by petitioner coming into her home and remaining in her home after being asked to leave.

ORDER

DAIL's decision to substantiate petitioner for abuse of a vulnerable adult is affirmed.

REASONS

By statute, the Commissioner of DAIL is required to investigate allegations of abuse, neglect or exploitation of vulnerable adults, and to keep the cases that are substantiated in a registry under the name of the person who committed the abuse, neglect or exploitation. 33 V.S.A. §§ 6906 and 6911(b). The law's purpose is to "protect vulnerable adults whose health and welfare may be adversely affected through abuse, neglect or exploitation". 33 V.S.A. § 6901.

Once DAIL substantiates abuse of a vulnerable adult, the person who has been substantiated may apply to the Human Services Board for relief. 33 V.S.A. § 6906(d). The hearing before the Board is de novo. DAIL bears the burden of proof to show by a preponderance of evidence that the petitioner's behavior meets the criteria for abuse.

The definition for abuse is set out in 33 V.S.A. § 6902(1) as follows:

(1) "Abuse" means:

(A) Any treatment of a vulnerable adult which places life, health or welfare in jeopardy or which is likely to result in impairment of health;

(B) Any conduct committed with an intent or reckless disregard that such conduct is likely to cause unnecessary harm, unnecessary pain or unnecessary suffering to a vulnerable adult;

. . .

(E) Intentionally subjecting a vulnerable adult to behavior which should reasonably be expected to result in intimidation, fear, humiliation, degradation, agitation, disorientation, or other forms of emotional distress; . . .

DAIL bases their case upon 33 V.S.A. § 6902(1)(E). The Vermont Supreme Court addressed the provisions of § 6902(1)(E) recently. In re E.C., 2010 VT 50 (E.O. 2010). The Supreme Court found that the statute includes both subjective and objective criteria. The tribunal can look at

subjective criteria in determining whether the person acted intentionally. However, the standard whether the person's behavior "should reasonably be expected to result" in emotional distress is an objective standard. The vulnerable adult's reaction to the person's behavior is a factor that may be considered, but is not the sole factor to be considered.

Petitioner made a decision to drop in on C.T. without advance notice during a time when petitioner knew C.T. was alone. Petitioner did not exercise the common courtesy of calling in advance and setting a time to see C.T. Petitioner did not explore other methods to obtain the information she needed. Petitioner must have been aware that C.T. might be unhappy to see petitioner after she had just terminated petitioner.

As C.T.'s personal care attendant for more than one and half years, petitioner was aware of C.T.'s routine and knew the extent of C.T.'s physical limitations. Petitioner's testimony indicates that she knew C.T.'s health could become impacted if C.T. became angry or upset. Petitioner stayed in C.T.'s house after being asked repeatedly to leave. Petitioner wanted her pay stubs and for C.T. to sign a form. Petitioner's actions on March 8, 2009 were intentional.

The issue is whether a reasonable person could assume that petitioner's actions would result in emotional distress to C.T. A reasonable person can make this assumption.

C.T. was alone in her home sitting in her living room. C.T. was immobile. Moreover, C.T. had just terminated petitioner as an employee. Without notice, petitioner comes to her home with two children and another past caretaker and will not leave when repeatedly requested to do so. Petitioner could have waited for L.P. to begin her shift before trying to speak to C.T. C.T. was faced with four people who would not leave. Because petitioner knew that L.P. would be arriving for her shift, petitioner could have waited outside for the police to arrive.

Here, there was more than the likelihood that petitioner's action would result in emotional distress to C.T., there was emotional distress. C.T. not only asked petitioner and the others to leave repeatedly but also became hysterical and shaken.

There is one additional issue. DAIL indicated they did not plan to call L.P. as a witness for the April 19, 2001 hearing. Petitioner wanted L.P. to testify. The Board mailed petitioner a subpoena for L.P. with instructions to the mailing address supplied by petitioner. L.P. was a

personal care attendant for C.T. on September 8, 2009 who arrived at 6:00 p.m. while the incident was in process. L.P. is no longer employed by C.T.

Petitioner stated that she did not receive the subpoena and that L.P. had relevant evidence. At hearing, the hearing officer asked petitioner to make a proffer of evidence or explain what she believed L.P. would testify to. Petitioner proffered that L.P. would testify that after the police left on September 8, 2009, C.T. told L.P. that she lied to the police and got petitioner into trouble, and C.T. then directed L.P. to go out and buy wine to celebrate. Petitioner proffered that L.P. would testify that L.P. recently cut C.T.'s hair at the beauty salon where she works and that C.T. is able to get out. However, petitioner did note that C.T. always had her hair cut at home so she did not understand why there would be a change in routine. In addition, petitioner's description of L.P.'s last statements makes no sense in light of C.T.'s admission to hospice care.

The hearing officer decided not to reopen the hearing for L.P.'s testimony. Even assuming that L.P. made these statements to petitioner, the statements not only contradict the evidence in the record but also, on their face, are not

credible. Even if the hearing officer accepted the proffer as accurate, the result would not change.

The issue is petitioner's behavior, not L.T.'s behavior, and whether petitioner's behavior rises to the level for substantiation of emotional abuse of a vulnerable adult.

DAIL has shown by a preponderance of evidence that petitioner emotionally abused C.T., a vulnerable adult, on September 8, 2009. DAIL's decision is affirmed. 3 V.S.A. § 3091(d), Fair Hearing Rule No. 1000.4D.

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